Nos. 82-1711 and 82-1771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF COLORADO, *Petitioner*,

v.

FIDEL QUINTERO, *Respondent*.

UNITED STATES OF AMERICA, *Petitioner*,

v.

ALBERTO ANTONIO LEON, *et al.*, *Respondents*.

On Writs Of Certiorari To The Supreme Court Of Colorado And The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE AMERICAN CIVIL LIBERTIES UNION, AND THE SOUTHERN POVERTY LAW CENTER, AS *AMICI CURIAE*

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BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE AMERICAN CIVIL LIBERTIES UNION, AND THE SOUTHERN POVERTY LAW CENTER, AS *AMICI CURIAE*

INTEREST OF AMICI CURIAE

This brief is respectfully submitted on behalf of the National Association for the Advancement of Colored People, the American Civil Liberties Union, and the Southern Poverty Law Center.[1]

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[1] This brief is filed with the consent of the parties; letters consenting to the filing of this brief have been lodged with the Clerk.

The National Association for the Advancement of Colored People (NAACP) was formed in 1909 as a non-profit membership corporation. It has nearly 2000 branches throughout the nation and a 1982 membership of approximately 450,000. The basic aims and purposes of the NAACP are to secure the elimination of all racial barriers that deprive black citizens of the privileges and burdens of equal citizenship rights in the United States. To this end, the NAACP devotes much of its funds and energies to an extensive program of litigation in pursuit of its declared purposes. The Association has a particular interest in these cases because of its concern that the rights under the Fourth Amendment of all citizens, and particularly minority citizens, be preserved and enforced by the courts.

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting and preserving the liberties safeguarded by the Constitution and the Bill of Rights. The prohibition against unreasonable searches and seizures contained in the Fourth Amendment is critically important among those safeguards. The ACLU has participated in many of the leading cases in which this Court has given shape and content to the Fourth Amendment's guarantee. In *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the ACLU filed the only brief before the Court urging application of the exclusionary rule to the States, and was permitted by the Court to raise the point at oral argument. 367 U.S. at 646 n.3. The ACLU appeared as *amicus curiae* in *Illinois* v. *Gates*, ____ U.S. ____, 103 S. Ct. 2317 (1983), and appears again here because of its belief that these cases present the most serious risk in recent years to the preservation of the requirements of the Fourth Amendment, and therefore to the right of all

Americans to be secure against unreasonable searches and seizures.

The Southern Poverty Law Center (the Center) is a non-profit law firm, located in Montgomery, Alabama, that specializes in the defense and enforcement of constitutional rights, particularly those of the less fortunate, throughout the southeastern United States. The Bill of Rights serves as the foundation for the Center's extensive constitutional litigation. The Center is convinced that the adoption of a "reasonable mistake" modification in these cases would erode the fundamental protections of the Fourth Amendment. The Center seeks to take an active stance against this threat of constitutional erosion through participation as *amicus curiae* in these cases.

The NAACP, the ACLU, and the Center hope that their participation will be of material assistance to the Court in weighing the impact upon Fourth Amendment protections threatened by the proposed modification of the exclusionary rule.

SUMMARY OF ARGUMENT

The cases now before the Court pose a question critical to the continued effectiveness of the Fourth Amendment. Adoption of the proposed modification of the exclusionary rule will go far to nullify the constitutional requirement of probable cause and to make all citizens less secure against unreasonable searches and seizures.[2]

A. The Fourth Amendment prohibits unreasonable searches and seizures. The touchstone of reasonableness

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[2] This brief is limited to *Colorado* v. *Quintero*, No. 82-1711, and *United States* v. *Leon*, No. 82-1771, because the ACLU directly represents the Respondent in *Massachusetts* v. *Sheppard*, No. 82-963, the third companion case before the Court.

is probable cause to believe that a crime has been committed. The probable cause standard reflects the judgment of the Framers of the Constitution as to the proper balance between the competing interests of personal privacy and effective law enforcement. This standard is a "practical, nontechnical conception" dealing with "the factual and practical considerations of everyday life," and it accordingly allows room for the mistakes of "reasonable men, acting on facts leading sensibly to their conclusions of probability," *Brinegar* v. *United States*, 338 U.S. 160, 175-76 (1949). Since the probable cause standard calls only for "a practical, common-sense decision," *Illinois* v. *Gates*, ___ U.S. ___, 103 S. Ct. 2317, 2332 (1983), there is adequate flexibility within constitutional bounds to accommodate the reasonable needs of effective law enforcement.

B. The exclusionary rule of *Weeks* v. *United States*, 232 U.S. 383 (1914), held applicable to the States in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), forbids the use of unconstitutionally obtained evidence against the victim of the violation during the prosecution's case-in-chief and thus effectuates the Fourth Amendment's prohibition against unreasonable searches and seizures by "compel[ling] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

Modification of the exclusionary rule by engrafting upon it an exception for so-called "reasonable mistakes" by police officers will encourage violations of the Fourth Amendment. It is pointless to speak of a "reasonable" violation of the flexible probable cause standard, which already allows room for reasonable misjudgments. It is inevitable that the proposed modification would nullify the requirement of probable cause by encouraging police

officers to act on mere suspicion with the knowledge that the "reasonable mistake" modification will make the illegally seized evidence admissible.

The further proposal that unconstitutionally obtained evidence be admissible whenever police have obtained a warrant would make magistrates' judgments substantially unreviewable; an invalid warrant would constitute adequate support for the invalid search and seizure since the police officer's "mistake" would be deemed reasonable and the magistrate's mistake in issuing the warrant would be ignored. The protections of the Fourth Amendment are too important to be left to the unreviewable discretion of police officers and magistrates in this manner.

C. No decision of this Court supports the proposed modification of the exclusionary rule. Limited uses of illegally obtained evidence have been authorized in peripheral situations where the incremental deterrent effect of excluding the evidence would have added only slightly, if at all, to the basic deterrence achieved by exclusion of the evidence from the government's case-in-chief. *See United States* v. *Calandra*, 414 U.S. 338 (1974); *United States* v. *Janis*, 428 U.S. 433 (1976); *Stone* v. *Powell*, 428 U.S. 465 (1976); and *United States* v. *Havens*, 446 U.S. 620 (1980). These decisions provide no basis for significantly weakening the exclusionary rule in the case-in-chief itself.

Petitioners' contention that the exclusionary rule should not be applied to "reasonable mistakes" has been rejected by the Court. In *United States* v. *Johnson*, 457 U.S. 537 (1982), dealing with the retroactivity of the ruling in *Payton* v. *New York*, 445 U.S. 573 (1980), that a warrant is required for a routine felony arrest in the suspect's home, the Court, finding that the issue had been

"unsettled" prior to *Payton*, rejected that circumstance as a ground for denying retroactivity to the *Payton* holding. The Court pointed out that if rulings resolving unsettled Fourth Amendment issues were made nonretroactive, then "in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior." 457 U.S. at 561. The policies of the exclusionary rule are similarly well served by application of the rule in the many cases involving arrests and searches made near the dividing line between probable cause and mere suspicion. As retired Justice Potter Stewart has recently written, "if this exception were adopted, police officers might shift the focus of their inquiry from 'what does the Fourth Amendment require?' to 'what will the courts allow me to get away with?' It seems inevitable in these circumstances that adoption of the proposed exception would result in more Fourth Amendment violations." Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1403 (1983).

ARGUMENT

Adoption Of The Proposed "Reasonable Mistake" Modification Of The Exclusionary Rule Would Be In Dereliction Of This Court's Duty To Preserve For All Citizens The Freedom From Unreasonable Searches And Seizures Guaranteed By The Fourth Amendment

Introduction

The exclusionary rule cases before the Court present a question of overriding importance concerning this Court's role as guardian of the freedoms enshrined in the Constitution. As we shall demonstrate, the proposed "reasonable mistake" modification presents a grave

threat to the Fourth Amendment freedoms of all citizens. The adoption of the proposed modification would signal to law enforcement officials that the Court will not insist on compliance with the Fourth Amendment requirement of probable cause but rather is prepared to encourage law enforcement officials to proceed with arrests and searches of citizens on mere suspicion. We urge the Court to reaffirm the importance of the Fourth Amendment protection of probable cause by emphatically rejecting the modification of the exclusionary rule now proposed.

A. The Fourth Amendment Reflects The Carefully Considered Judgment Of Our Founding Fathers That Arrests And Searches Should Be Undertaken Only In Accordance With the Flexible Standard Of Probable Cause

The Fourth Amendment to the Constitution, applicable to the States through the Fourteenth Amendment, provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourth Amendment prohibits only "unreasonable" searches and seizures. This Court has repeatedly held that an arrest or search can be reasonable only if probable cause exists.[3] The need for probable cause is clear whether the police officer is entitled to proceed without an arrest or search warrant, or is acting pursuant to a

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[3] We shall address in this brief only full-blown arrests and searches, not the brief and limited intrusions upon privacy (far short of full arrests and searches) that the Court has authorized in *Terry* v. *Ohio*, 392 U.S. 1 (1968), and its progeny.

warrant. *See Dunaway* v. *New York*, 442 U.S. 200 (1979); *Illinois* v. *Gates*, ___ U.S. ___, 103 S. Ct. 2317 (1983).

Probable cause is the cornerstone of substantive Fourth Amendment protection and was designed by the Framers of the Constitution to reflect a proper balance between the competing interests of personal privacy and law enforcement. As this Court has recognized, the "long-prevailing standards" of probable cause "seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection." *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). As the Court observed in *Dunaway*, "[t]he standard of probable cause thus represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment." *Dunaway* v. *New York*, *supra*, 442 U.S. at 208. The standard also represents a recognition that searches made on less than probable cause are more likely than those with probable cause to intrude upon the privacy of innocent persons.

Probable cause is a common-sense concept that does not require certainty of guilt. As stated in *Brinegar:*

> "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." 338 U.S. at 175-76, *quoting Carroll* v. *United States*, 267 U.S. 132, 162 (1925).

The Court's most recent exposition concerning probable cause occurred only last Term in *Illinois* v. *Gates*, ___ U.S. ___, 103 S. Ct. 2317 (1983). There, the decision

reaffirmed the "central teaching" of the Court's earlier decisions that probable cause is a "practical, nontechnical conception." "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ____ U.S. at ____, 103 S. Ct. at 2328, *quoting Brinegar* v. *United States*, *supra*, 338 U.S. at 175, 176.

The Court in *Gates* "reaffirm[ed] the totality of the circumstances analysis that traditionally has informed probable cause determinations." ____ U.S. at ____, 103 S. Ct. at 2332. Under this test, it is the task of a magistrate considering an application for a search warrant

> "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.*

"[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* at 2335 n.13.

The "probable cause" standard leaves room for reasonable police errors of fact and of law. In *Brinegar*, the Court made this important observation:

> "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, *room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.* The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for

> accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." 338 U.S. at 176. (Emphasis supplied.)

The Fourth Amendment's tolerance of reasonable police mistakes is reflected in the rulings of this Court. In *Hill* v. *California*, 401 U.S. 797 (1971), the Court upheld a warrantless arrest and subsequent search incident to the arrest where the police had probable cause to arrest an individual named Hill but through a mistake in identity arrested another person in Hill's apartment. The Court found the officers' actions consistent with the Fourth Amendment. The officers' mistake in arresting the wrong person did not negate the fact that probable cause existed for the arrest.

The Court's decision in *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979), also reflects the flexibility embodied in the probable cause standard. There, the police arrested the respondent for a violation of a Michigan statute which was later held unconstitutional. Noting that probable cause was present at the time of the arrest, the Court upheld the arrest as reasonable under the Fourth Amendment. The Court rejected the claim that the police should have anticipated that the statute would be found unconstitutional.

The Court's decision in *Franks* v. *Delaware*, 438 U.S. 154 (1978), is also illustrative. In *Franks*, the Court held that a search warrant cannot be attacked on the basis of erroneous "facts" provided by an informant to a police officer, so long as the officer reasonably credits those facts.

The foregoing discussion is intended to highlight the flexibility embodied in the Fourth Amendment. As this

Court's decisions demonstrate, the probable cause standard was carefully chosen by our Founding Fathers as the appropriate balance of the citizens' rights in personal privacy, on the one hand, and in effective law enforcement, on the other.

B. The Proposed Modification Of The Exclusionary Rule Will Encourage Violations Of The Fourth Amendment

1. The Exclusionary Rule Preserves The Fourth Amendment Freedoms Of All Citizens

The exclusionary rule adopted in federal prosecutions in *Weeks* v. *United States*, 232 U.S. 383 (1914), and extended to state prosecutions in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), was "adopted to effectuate the Fourth Amendment right of all citizens 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .' Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *United States* v. *Calandra*, 414 U.S. 338, 347 (1974). The exclusionary rule comes into play, of course, only when police conduct is "unreasonable" within the meaning of the Fourth Amendment. The exclusionary rule is applicable, therefore, only where the Framers of the Constitution forbade the police to secure evidence in the manner in which it was obtained.

The exclusionary rule protects all citizens by "compel-[ling] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960). The rule removes this incentive by attempting to ensure that law enforcement officials will not be able to use evidence of crime obtained through violations of Fourth Amendment standards. The rule is intended,

moreover, to deter all law enforcement officials from committing such violations. As stated by Justice Stevens, concurring in *Dunaway* v. *New York*, *supra*, 442 U.S. at 221: "The justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole—not the aberrant individual officer—to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights."

The exclusionary rule continues to be the only available means of securing Fourth Amendment protections.[4] As retired Justice Stewart has recently written, for "the vast majority of fourth amendment violations," "a remedy is required that inspires the police officer to channel his enthusiasm to apprehend a criminal toward the need to comply with the dictates of the fourth amendment. There is only one such remedy—the exclusion of illegally obtained evidence." Stewart, *The Road to Mapp* v. *Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1389 (1983) [hereinafter cited as "Stewart"]. Justice Jackson succinctly explained in *Brinegar* how the exclusionary rule works to protect Fourth Amendment rights:

> "If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be,

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[4] Petitioners have not seriously argued that alternative means have been developed to protect Fourth Amendment rights. The United States suggests that the absence of effective alternatives is "simply not a controlling consideration." Brief for the United States, at 88.

and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." 338 U.S. at 181 (dissenting opinion). (Emphasis supplied.)

In the absence of the exclusionary rule, the disincentive associated with unconstitutional behavior would disappear. The result would be a significant reduction in Fourth Amendment protection.[5]

2. The proposed modification would encourage police officers to conduct arrests and searches on less than probable cause

The modification of the exclusionary rule now proposed would give official encouragement to arrests and searches on less than probable cause.

As described by the United States, the modification would apply (i) to warrantless arrests and searches by police officers who believe that a crime is being committed in their presence (Brief for the United States, at 47-57) and (ii) to searches made pursuant to a judicially

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[5] The New York Deputy Police Commissioner stated after the decision in *Mapp* v. *Ohio*, 367 U.S 643 (1961):

"The *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the Constitution requires warrants in most cases, the Supreme Court had ruled [until 1961] that evidence obtained without a warrant—illegally, if you will—was admissible in state courts. So the feeling was, why bother?" *The New York Times*, April 28, 1965, p. 50.

authorized warrant (Brief for the United States, at 57-68).

In the first of these situations, the United States urges that police officers must be free to respond to on-the-scene situations that develop in their presence without fear that their actions will be condemned by the courts long after the event. The Fourth Amendment, however, provides police officers with ample leeway to act in such situations. It is well established that "the Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense." *Michigan* v. *DeFillippo*, *supra*, 443 U.S. at 36.

Petitioners contend that in cases near the dividing line between probable cause and mere suspicion the exclusionary rule should be inapplicable even if it turns out that the officer proceeded without probable cause. According to Petitioners, an officer proceeding without probable cause in a close case has made a "reasonable mistake" about the requirements of the Fourth Amendment, and no useful deterrent purpose would be served by applying the exclusionary rule in such instances. *See*, *e.g.*, Brief for the United States, at 30-31, 47-57.

Petitioners' position that arrests and searches made on the basis of suspicion should not lead to application of the exclusionary rule must be rejected for two reasons. First, if police action is taken without probable cause, then it cannot be based on a "reasonable" mistake within the contemplation of the Fourth Amendment. As noted, the probable cause standard affords ample leeway for reasonable police judgment, including reasonable errors. As the Court observed in *Brinegar*, however, "the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability" of criminal

activity. 338 U.S. at 176. A police officer who has proceeded without probable cause has necessarily made an "unreasonable" error in the eyes of the Fourth Amendment.[6] The "reasonable mistake" modification, therefore, is a contradiction in terms and at odds with the Fourth Amendment.

Second, the proposed modification would effectively destroy the probable cause standard and make probable cause a mere exhortation without practical significance. Arrests and searches made on suspicion would carry with them potential benefits for police officers in the form of admissible evidence, while threatening none of the adverse consequences that must accompany unconstitutional behavior. Officers would quickly learn that as long as they could point to some basis for their suspicion, an arrest or search could be undertaken without probable cause. If the police action produced evidence, the evidence would be admissible. If no evidence were secured, the officer would have lost nothing for the effort. The result in either event would be the encouragement of police action forbidden by the Fourth Amendment.

A corresponding impairment of Fourth Amendment protection will result if, as the United States urges, evidence seized pursuant to an invalid warrant is rendered admissible in criminal proceedings. The position of the United States on this point, in effect, is that, except in some undefined category of rare cases, a magistrate's assessment of probable cause should be conclusive.[7]

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[6] *See, e.g., Ybarra* v. *Illinois*, 444 U.S. 85 (1979); *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979); *Dunaway* v. *New York*, 442 U.S. 200 (1979); *Whiteley* v. *Warden*, 401 U.S. 560 (1971).

[7] The United States states that suppression of evidence secured pursuant to a warrant "*may* be justified if the factors relied on by the magistrate 'were so lacking in indicia of probable cause as to render

Elimination of the exclusionary rule where a warrant has been issued will permit an illegal warrant to shield an illegal search or seizure. Since a warrant based on suspicion will assure admissibility, probable cause will no longer be the operative standard for a police officer deciding whether he has sufficient information to present to a magistrate. The officer will have every incentive to proceed on suspicion, on the chance that the magistrate will issue the warrant, and no incentive to engage in further investigation so as to satisfy the Fourth Amendment's requirement of probable cause.

The United States will no doubt respond that magistrates are available to prevent the indiscriminate use of unlawful warrants. Magistrates need not be lawyers, however, and they "certainly do not remain abreast of each judicial refinement of the nature of 'probable cause.' " *Illinois* v. *Gates*, *supra*, ____ U.S. ____, 103 S. Ct. at 2330. Without intending any disrespect for persons serving as magistrates, *Amici* submit that these individuals simply cannot be entrusted with the ultimate preservation of our Fourth Amendment freedoms, without the modulating effects of judicial review available for all other infringements of constitutional rights. We agree with retired Justice Stewart that "if the fourth amendment's probable cause requirement is to be enforced, reviewing courts must have the authority on occasion to inform magistrates in a meaningful way that warrants

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official belief in its existence entirely unreasonable.' " Brief for the United States, at 65 (emphasis supplied). This suggests that the United States would permit continued application of the exclusionary rule in those few cases in which there is no information to support the issuance of the warrant. This concession cannot justify the dilution of probable cause that will inevitably result if the modification is adopted.

based on something less than probable cause are not to be tolerated." Stewart, *supra*, 83 Colum. L. Rev. at 1403.

This Court has never accorded conclusive effect to magistrates' determinations of probable cause. *Franks* v. *Delaware*, 438 U.S. 154 (1978); *Nathanson* v. *United States*, 290 U.S. 41 (1933). In *Gates*, the Court reaffirmed that although the scope of review is limited, "courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." ____ U.S. at ____, 103 S. Ct. at 2332. The Court reiterated that "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." ____ U.S. at ____, *id.* at 2332, *quoting Jones* v. *United States*, 362 U.S. 257, 271 (1960).

Petitioners' proposed modification of the exclusionary rule is thus in reality an attack on the constitutional requirement of probable cause. The modification rests on the view that it is simply not important—where the issue is close—whether arrests and searches are made on the basis of probable cause or on the basis of suspicion. Indeed, the United States openly admits this. According to the United States, resolution of the "fact-specific questions" of probable cause in such cases as *Leon* and *Quintero* does

> "little to advance understanding of Fourth Amendment principles of general importance. In such instances, it will generally be far easier to determine the applicability of the reasonable mistake exception than to grapple with the nettlesome but *relatively inconsequential* underlying substantive question." Brief for the United States, at 83. (Emphasis added.)

The need for probable cause for police action is anything but "inconsequential"; it is the heart of the Fourth Amendment. Petitioners apparently fail to recognize that

this Court is not free to revise the Constitution or to reevaluate the Framers' basic judgment, reached after careful balancing of the interests at stake, that law enforcement officials should be forbidden from proceeding with searches and seizures except upon probable cause and should not have the use of evidence secured through police action based only on suspicion.

Petitioners repeatedly assert that the exclusionary rule imposes significant "costs" on the criminal justice system. The balance of costs and benefits, however, has already been struck by the Framers. The exclusionary rule does no more than effectuate the Fourth Amendment, and the rule, therefore, imposes no "costs" beyond those that are intended to be imposed by obedience to the Constitution.[8] *Amici* submit that the "costs" of complying with the Fourth Amendment cannot justify the virtual abandonment of the standard of probable cause. If the probable cause standard is to be abandoned, the constitutionally designated processes for amendment must be observed.

The proposed modification would make probable cause a relic of a bygone era. *Amici* submit that the issue of probable cause should not be relegated to some sort of

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[8] Retired Justice Stewart has observed that:

> "Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the fourth amendment itself. It is true that, as many observers have charged, the effect of the rule is to deprive the courts of extremely relevant, often direct evidence of the guilt of the defendant. But these same critics sometimes fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place."

Stewart, *supra*, 83 Colum. L. Rev. at 1392. See also *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978).

constitutional oblivion. The courts must continue to decide the issue of probable cause and must exclude evidence secured where this fundamental requirement is not met. The Fourth Amendment's protection against arbitrary invasions of privacy will inevitably wilt and disappear if it is not given content and enforced by the courts.[9]

C. No Decision Of This Court Provides A Basis For The Proposed Modification Of The Exclusionary Rule, And The Decision In *United States* v. *Johnson*, 457 U.S. 537 (1982), Mandates Its Rejection

Petitioners point to a number of this Court's decisions as purportedly supporting the proposed modification of the exclusionary rule. As we shall demonstrate, however, the Court's decisions do not provide a basis for the modification, but rather underscore the need for the retention of the exclusionary rule in criminal trials. The Court's recent pronouncement in *United States* v. *Johnson*, 457 U.S. 537 (1982), in particular mandates rejection of the modification.

The Court's decisions in such cases as *United States* v. *Calandra*, 414 U.S. 338 (1974) (grand jury questions based upon illegally obtained evidence); *United States* v.

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[9] Probable cause issues such as those presented in *Quintero* and *Leon* arise frequently. If such cases are decided in the future under a "reasonable mistake" rule rather than under the Fourth Amendment standard of probable cause, probable cause will quickly lose its place as a requirement of constitutional importance. Prosecutors will regularly proceed, as the United States and Colorado have in this Court, by seeking to avoid decision of the issue of probable cause. *See* Petition for Certiorari in *United States* v. *Leon*, at 9 n.10; Brief for Petitioner in *Colorado* v. *Quintero*, at 10-11. The Court, of course, is free to decide the probable cause issues in these cases notwithstanding Petitioners' submissions.

Janis, 428 U.S. 433 (1976) (use of evidence illegally obtained by State officer in federal civil proceeding); *Stone* v. *Powell*, 428 U.S. 465 (1976) (consideration by federal habeas corpus court of Fourth Amendment claim already heard by a state tribunal); and *United States* v. *Havens*, 446 U.S. 620 (1980) (use of illegally obtained evidence for impeachment at trial), all explicitly rest on the rationale that the deterrence achieved by the exclusionary rule would be enhanced only minimally, if at all, if the exclusionary rule were extended beyond its core application during the government's case-in-chief. As observed by the United States, "it appeared unlikely to the Court" in each of those cases "that police officers would be encouraged to engage in prohibited conduct by the availability of the particular uses of unlawfully seized evidence there permitted." Brief for the United States, at 42.

In the present situation, by contrast, it is clear for the reasons previously discussed that the proposed modification will operate to encourage the police to engage in unconstitutional conduct. The Court's decisions refusing to extend the rule beyond the government's case-in-chief, therefore, provide no basis for the current effort to sap the rule's vitality in the case-in-chief itself. Indeed, the Court's reliance on the efficacy of the exclusionary rule at trial as a basis for the Court's refusal to exclude illegally obtained evidence in other proceedings only serves to underscore the need for retention of the exclusionary rule in its core application.

Nor do the Court's decisions in *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979), and *Hill* v. *California*, 401 U.S. 797 (1971), provide any basis for modifying the exclusionary rule. *See* Brief for the United States, at 53-55. In both cases, probable cause existed for the arrests, and the Court held only that the subsequent invalidation of

the criminal statute in *DeFillippo* and the error by the police concerning the identity of the arrestee in *Hill* did not detract from the lawfulness of the arrests under the Fourth Amendment. Both cases dealt with *constitutional* police action and do not suggest that *unconstitutional* police actions should be placed beyond the reach of the exclusionary rule.[10]

Nor is the Petitioners' heavy reliance on the Court's decision in *United States* v. *Peltier*, 422 U.S. 531 (1975), warranted. *See* Brief for the United States, at 34, 37, 43. *Peltier* was a retroactivity case that addressed the applicability of the rule announced in *Almeida-Sanchez* v.

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[10] The Court's decisions in *Alderman* v. *United States*, 394 U.S. 165 (1969), *Michigan* v. *Tucker*, 417 U.S. 433 (1974), *Brown* v. *Illinois*, 422 U.S. 590 (1975), and *United States* v. *Caceres*, 440 U.S. 741 (1979), likewise do not support the drastic curtailment of the exclusionary rule proposed by Petitioners.

In *Alderman*, the Court reaffirmed the exclusionary rule, 394 U.S. at 174-75, and simply refused to enlarge its scope by permitting its invocation by persons whose constitutional rights had not been violated. In *Brown*, the issue was whether a confession was the product of an unconstitutional arrest. Both the majority opinion, which reversed the conviction, and the concurring opinion, which proposed remand for a "taint" hearing, recognized that a confession tainted by a Fourth Amendment violation is inadmissible in a criminal trial.

Tucker did not involve a Fourth Amendment issue but rather a pre-*Miranda* violation of the *Miranda* rule. There, the Court noted that the defendant's incriminating statement had been excluded at trial. The Court held only that the testimony of a prosecution witness mentioned in defendant's statement would not also be suppressed. *Caceres* likewise presented no Fourth Amendment question. The case involved only a violation of agency regulations which did not infringe on any Fourth Amendment or other constitutional right of the defendant. Fourth Amendment exclusionary rule precedents were simply inapplicable. 440 U.S. at 754-55.

United States, 413 U.S. 266 (1973), to border searches conducted prior to the date of that decision. The Court found that the Border Patrol's pre-*Almeida-Sanchez* practices were "in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval" and therefore "conform[ed] . . . to the prevailing statutory [and] . . . constitutional norm." 422 U.S. at 541, 542. The Court reasoned that in light of the prior law supporting the pre-*Almeida-Sanchez* practices, there was no basis upon which it could "be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." 422 U.S. at 542. The Court accordingly declined to apply the exclusionary rule to the Border Patrol's pre-*Almeida-Sanchez* conduct.

The Court's subsequent decision in *United States* v. *Johnson*, 457 U.S. 537 (1982), demonstrates the limited reach of the Court's holding in *Peltier*. In *Johnson*, the Court considered the applicability of the rule announced in *Payton* v. *New York*, 445 U.S. 573 (1980), to arrests made prior to the date of that decision. In *Payton*, the Court, resolving a previously unsettled question, held that an arrest warrant is necessary when police officers make a routine felony arrest of a person in his own home. The United States urged in *Johnson* that the Court's decision in *Peltier* was controlling and that police officers proceeding prior to *Payton* could not be faulted for failing to obtain an arrest warrant. The United States urged that the deterrent purposes of the exclusionary rule would not be served by application of the rule to pre-*Payton* arrests.

The Court in *Johnson* rejected the United States' reliance on *Peltier*. The Court noted that the rule an-

nounced in *Almeida-Sanchez*, which was at issue in *Peltier*, "represented a 'clear break' with the past" and "[f]or that reason alone, under controlling retroactivity precedents, the nonretroactive application of *Almeida-Sanchez* would have been appropriate even if the case had involved no Fourth Amendment question." *United States* v. *Johnson*, *supra*, 457 U.S. at 558. The Court then concluded that the situation in *Johnson*—where the necessity for an arrest warrant was "unsettled"—was readily distinguishable for exclusionary rule purposes from the situation in *Peltier*—where the Border Patrol's actions clearly conformed in all respects with the law as it stood prior to *Almeida-Sanchez*. 457 U.S. at 558, 560-61.

In *Johnson*, the Court rejected the United States' contention that if the lawfulness of police conduct is debatable, the police should be entitled to proceed and the exclusionary rule should be inapplicable to any evidence secured. The Court found that this approach would jeopardize Fourth Amendment freedoms:

> "If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question." *United States* v. *Johnson*, *supra*, 457 U.S. at 561.

In *Johnson*, the Court concluded that the exclusionary rule must be applied in close cases to induce police officers to act within the bounds of the Fourth Amendment. This should be the Court's ruling here as well. Law enforce-

ment officials cannot be provided with "official certainty" that evidence obtained through a search or seizure without probable cause will be admissible at a criminal trial. *United States* v. *Johnson*, *supra*, 457 U.S. at 561. As retired Justice Stewart has concluded, if the policies of the exclusionary rule, as held in *Johnson*, are "served by requiring exclusion when police officers make a mistake while acting in a constitutional 'gray area,' it is clear that the same policies are served when officers act unconstitutionally by engaging in conduct that is prohibited under settled fourth amendment precedent." Stewart, *supra*, 83 Colum. L. Rev. at 1402-03.

CONCLUSION

Petitioners suggest that the proposed modification should be adopted in the interests of effective law enforcement. Contrary to Petitioners' suggestion, however, the issue is not whether effective law enforcement is a desirable goal. As we have noted, the Fourth Amendment provides ample room for effective law enforcement. The issue here is whether the particular balance between personal privacy and law enforcement embodied in the Fourth Amendment will be preserved and enforced. In our society, the ends do not justify the means, and *Amici* submit that the ends of law enforcement cannot justify the sacrifice of the requirement of probable cause. We cannot improve on this Court's declaration nearly seventy years ago in *Weeks:*

> "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." 232 U.S. at 393.

We submit that the issues surrounding the proposed "reasonable mistake" or "good faith" modification of the exclusionary rule have now been fully and exhaustively examined and that the proposed weakening of the exclusionary rule is simply inconsistent with the preservation of Fourth Amendment rights. The proposed modification of the exclusionary rule should be firmly and finally rejected by this Court.

Respectfully submitted,

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